Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 431.

IN THE MATTER OF THE APPLICATION OF TESSIM ZORACH AND ESTA GLUCK, PETITIONERS-APPELLANTS, FOR AN ORDER PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE ACT,

Against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, AND JAMES MARSHALL, CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, AND FRANCIS T. SPAULDING, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, RESPONDENTS, DIRECTING THEM TO DISCONTINUE CERTAIN SCHOOL PRACTICES, AND THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS, INTERVENOR-RESPONDENT.

BRIEF FOR FRANCIS E. KELLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK.

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No. 431.

In the Matter of the Application of TESSIM ZORACH and ESTA GLUCK, Petitioners-Appellants, for an Order Pursuant to Article 78 of the Civil Practice Act,

Against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York, Respondents, Directing Them to Discontinue Certain School Practices, and THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS, Intervenor-Respondent.

BRIEF FOR FRANCIS E. KELLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK.

Statement.

This is a brief *amici curiae* in support of the main brief of the respondent Commissioner of Education of the State of New York.

It is our purpose to cite and argue certain pertinent decisions of the Massachusetts Supreme Judicial Court and a few decisions of the highest courts in some other jurisdictions which are not cited in the respondent's main brief. It is not, however, our intention to be redundant in so far as the respondent's main brief is concerned. In the Zorach case the constitutionality of the New York statute is being tested on released time. Massachusetts has a pertinent statute which compares favorably with this New York statute. Therefore we contend that we have a real interest in this case in order to protect the constitutionality of our statute.

Issues.

1. Whether or not the Massachusetts statute compares favorably with the New York statute.
2. If so, then are the statutes of New York and Massachusetts constitutional?
3. Whether released time for religious purposes furthers education.

Pertinent Constitutional Provisions and Statutes Involved.

Constitution of the United States, Amendments, Article XIV.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Massachusetts, Declaration of Rights, Article II.

"It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship."

Amendments, Article XI.

"As the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government;—therefore . . . all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."

Amendments, Article XVIII, Section 1, as found in Article XLVI of the Amendments.

"SECTION 1. No law shall be passed prohibiting the free exercise of religion."

Massachusetts General Laws (Tercentenary Edition), Chapter 71, Section 31.

"A portion of the Bible shall be read daily in the public schools, without written note or oral comment; but a pupil whose parent or guardian informs the teacher in writing that he has conscientious scruples against it, shall not be required to read from any particular version, or to take any personal part in the reading. The school committee shall not purchase or use in the public schools school books favoring the tenets of any particular religious sect."

Argument.

I.

The Massachusetts Statute Compared Favorably with the New York Statute.

St. 1941, c. 423, amending G.L. (Ter. Ed.) c. 76, § 1 (approved June 30, 1941), an Act authorizing the absence from public schools at certain times of children for the purpose of religious education and prohibiting the expenditures of public funds for such education or for transportation incidental thereto:

"Absences may also be permitted for religious education at such times as the school committee may establish; provided, that no public funds shall be appropriated or expended for such education or for transportation incidental thereto; and provided, further, that such time shall be no more than one hour each week. (For the purposes of this section, school committees shall approve a private school only when the instruction in all the studies required by law is in English, and when satisfied that such instruction equals in thoroughness and efficiency, and in the prog-

ress made therein, that in the public schools in the same town; but they shall not withhold such approval on account of religious teaching)"

St. 1950, c. 400 (approved May 4, 1950), struck out the last sentence in G.L. (Ter. Ed.) c. 76, § 1, namely, that sentence embraced by parentheses, and inserted a new sentence plus a new paragraph as follows:

"For the purposes of this section, school committees shall approve a private school only when the instruction in all the studies required by law is in English, and when satisfied that such instruction equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching, and, in order to protect children from the hazards of traffic and promote their safety, cities and towns may appropriate money for conveying pupils to and from any schools approved under this section.

"Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum."

Released time operates in New York State today pursuant to section 3210 of the Education Law—a part of the Compulsory Attendance Law (Education Law, art. 65,

part I, §§ 3201-3229). The statute gives legislative approval to a practice, followed prior to its adoption in 1940, by local school authorities acting under general supervisory powers conferred upon them by the Education Law. It provides in subdivisions 1-a and 1-b as follows:

> "§ 3210. Amount and character of required attendance
>
> "1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.
>
> "b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

The provision permitting absence for religious observance and education first came into the statute by amendment of former section 625 of the Education Law by chapter 305 of the Laws of 1940. That section has since been renumbered 3210.

The Rules of the State Commissioner of Education.

The rules of the State Commissioner of Education of New York adopted on July 4, 1940, to implement the statutory provision, and now remaining in full force and effect, provide as follows:

> "1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be ex-

cused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools." (Regulations of the Commissioner of Education, art. 17, § 154; State of New York, Official Compilation of Codes, Rules and Regulations, vol. 1, p. 683.)

By mere observance of the wording of both statutes, it must be readily ascertained without the necessity of further argument that they compare favorably one with the other in all pertinent aspects.

II.

The Statutes of Massachusetts and New York are Constitutional.

In *Cantwell* v. *Connecticut*, 310 U.S. 296, it was held that the Fourteenth Amendment, which is applicable only to the States, embraces the liberty guaranteed by the First

Amendment, namely, the free exercise of religion. This freedom is twofold: freedom to believe and freedom to act. A State may by general and non-discriminatory legislation regulate the act. In said case the accused solicited funds for his religious denomination's cause in violation of a statute which required a license. The Court said the State may regulate the time, places and manner of soliciting on its streets and of holding meetings thereon; but it cannot deny the right to preach and disseminate religious views. Soliciting funds for a religious purpose was held to be the equivalent of an exercise of religion.

In 1940 the Honorable Walter F. Downey, Commissioner of Education of the Commonwealth of Massachusetts, requested of the then Attorney General, Paul A. Dever, an opinion upon the legality of a plan, then under consideration by the School Committee of the City of Boston, to "release pupils part time from school to receive religious education outside of school buildings at the request of the parents."

> Opinion of the Attorney General to the Commissioner of Education dated January 7, 1941.

In this opinion it was stated that "Neither the Forty-sixth Article of the Amendment (proposed by the Constitutional Convention of 1917) nor any other article of the Constitution, however, discriminates against religion or religious instruction."

The Commonwealth of Massachusetts has always endeavored as have other States to work in conjunction with the church. The Legislature as far back as 1855, which proposed the Eighteenth Amendment, enacted a law providing that "the school committee of each town and city in this Commonwealth shall require the daily reading of some portion of the Bible in the common English version . . ."

(St. 1855, c. 410), a provision now contained in substance in G.L. (Ter. Ed.) c. 71, § 31, although qualified by the provision that the reading must be "without written note or oral comment" and that "a pupil whose parent or guardian informs the teacher in writing that he has conscientious scruples against it, shall not be required to read from any particular version, or to take any personal part in the reading."

After the adoption of the Eighteenth Amendment the Massachusetts Supreme Judicial Court held in *Spiller* v. *Inhabitants of Woburn*, 12 Allen, 127, in 1866, that the school committee of Woburn might lawfully pass an order that the schools thereof should be opened each morning with reading from the Bible and prayer, and that during the prayer each student should bow the head unless his parents requested that he be excused from so doing, and that it might lawfully exclude from the school a student who refused to comply with such order whose parents refused to request that he be excused from doing so.

As Justice Pound so aptly stated in *People, ex rel. Lewis,* v. *Graves,* 245 N.Y. 195:

> "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support."

Attorney General Paul A. Dever in his aforementioned opinion said:

> "It is my opinion that the Forty-sixth Article of Amendment of the Massachusetts Constitution is to be construed in the same manner as the New York Court of Appeals construed the similar constitutional provision of that state [1] and for the reason stated.

[1] *People, ex rel. Lewis,* v. *Graves,* 245 N.Y. 195.

"I am therefore of opinion that the Massachusetts Constitution does not prohibit the Boston School Committee from releasing pupils part time from school to receive religious education outside of public school buildings, at the request of their parents, provided that the plan adopted involves no expenditure of public funds, the use of public property or the loan of public credit."

In the case now before this Court the State of New York in providing "released time for religious purpose" has not expended public funds or property, and has provided for all religious sects and denominations. Thus they have complied with the Massachusetts Eleventh Article of Amendment, guaranteeing equal protection to all religious sects and denominations, not only of the Christian religion but others as well.

For the Massachusetts Supreme Judicial Court has held that the guaranties of religious equality are not confined to adherents of the Christian faith, and that they protect Jews as well as Christians.

Glaser v. *Congregation Kehillath Israel*, 263 Mass. 435, 437.

III.

Released Time for Religious Purposes Furthers Education.

Eliminating this so-called "released time" obviously puts obstacles in the path of education rather than facilitating it.

It necessarily follows that "released time" for religious purposes is a fundamental part of education and as such should be a part of the school curriculum.

Eliminating the so-called "released time" for religious purposes would make for discord rather than harmony.

The history of our great stride in the field of education discloses that the fulcrum of our success is the contribution made by the many sects or denominations which founded our great institutions of learning. The States and churches have throughout history endeavored to cooperate each with the other.

Francis E. Kelly, Attorney General, v. *Inhabitants of the Town of Dover,* Mass. Adv. Sh. (1951) 849.

"Education" means "discipline of the mind or character through instruction or study."

The dissemination of every legitimate form of knowledge, including religious beliefs, tenets, religious philosophy or theology, would come within the definition of education.

Thus the released time for religious purpose affords the students further education.

The purpose of education is to educate the whole of man, morally, socially, physically and *spiritually.*

Efforts to gain religious certitudes often produce bewilderment and skepticism. It is therefore the duty not only of the church but also of the State harmoniously to help in the guidance of our youth.

Chief Justice Bigelow, writing the opinion of the Court in the case of *Spiller* v. *Inhabitants of Woburn,* 12 Allen, 127, said:

> "No more appropriate method could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this commonwealth, and which teach-

ers are especially enjoined to carry into effect, is 'to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for truth'."

Conclusion.

We respectfully submit, therefore, that upon all of the foregoing the statute involved herein is constitutional.

Respectfully submitted,
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